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No. 91-1916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WESTERN SHOSHONE NATIONAL COUNCIL, in Its Own Behalf and in Behalf of Western Shoshone Tribal Governments; IAN ZABARTE; FELIX IKE,
Petitioners,

v.

WILLIAM MOLINI, Director, Nevada Department of Wildlife; TERRY CRAWFORTH, Director of Law Enforcement, Nevada Department of Wildlife,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether extinguishment of Western Shoshone aboriginal and treaty-based title was conclusively established by the Indian Claims Commission award paid to the Western Shoshone Indians?

Whether full extinguishment of aboriginal and treaty-based title included hunting and fishing rights as an incident of title?

Whether the conclusive extinguishment effect of an Indian Claims Commission award precludes Indian land claims against non-federal entities?

LIST OF PARTIES

The petitioners have adequately described the parties.

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OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners have adequately described the Opinions Below, the jurisdiction of this Court, and the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

This case concerns the attempt of some Western Shoshone Indians to reestablish a tribal sovereign interest in nearly half of the State of Nevada, even though they were compensated for extinguishment of that title. The vehicle for this effort is an asserted claim to tribal hunting and fishing rights in a large portion of Nevada.

The United States Congress, in recognition of a history of unfair treatment of Native Americans, and to effect a measure of recompense, enacted the Indian Claims Commission Act, Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (formerly codified as amended at 25 U.S.C. §§ 70 to 70v-2 (1976)). The Act provided for monetary awards for all manner of injustice, and it provided for finality in the claims process by payment of an award. 25 U.S.C. § 70u (1976 ed.).

In 1951, the Western Shoshone presented a claim to the Indian Claims Commission (ICC). The claim was for the taking of both aboriginal and treaty-based title to a 22 million acre portion of the State of Nevada. The Western Shoshone pled in the alternative:

> In violation of said Western Band's rights of ownership or occupancy in the lands referred to in paragraph 15 hereof, *or in violation of the right or title or ownership or occupancy recognized in the said bands by the Treaty of Ruby Valley*, defendant has disposed of a large part of said land to settlers and others, or has seized and converted a large part of the said lands to its own use and benefit, without any compensation to the said Western Bands or compensation agreed to by them.

Quoted in *Western Shoshone Identifiable Group v. United States*, 35 Ind. Cl. Comm. 457, 461 (1975) (emphasis added).

In 1962, the ICC determined that the Western Shoshone lands had been taken by the gradual encroachment of whites and

others, that their title to the land had been extinguished, and ordered an award as compensation. *Shoshone Nation or Tribe of Indians v. United States*, 11 Ind. Cl. Comm. 387, 445-446-b (1962).

The date of extinguishment was agreed by the parties to be July 1, 1872. *Temoak Band of Western Shoshone Indians v. United States*, 219 Ct. Cl. 346, 356 (1979), *cert. denied*, 444 U.S. 973. The ICC referred to this as the date "of full title extinguishment." *Id.* at 357. The value of the "entire fee" was measured to determine the amount to which the Indians were entitled. *Id.* Payment on the claim was made when funds in the amount of $26 million were placed in a trust account in the United State Treasury for the Shoshone Tribe. *United States v. Dann*, 470 U.S. 39, 105 S. Ct. 1058 (1985).

In 1974, many years into the proceedings, a schism surfaced among the Western

Shoshone concerning the proper legal strategy to pursue. The court noted that the dominant, or "money" group:

> [B]elieve[s] it best for all the Western Shoshone Identifiable Group to contend that the Nevada lands involved were "taken" by the United States and that therefore very large amounts of money are due the Identifiable Group for that extinguishment of title. [The dissenters], on the other hand, believe that the correct course to pursue is to insist that the lands were never taken and are still owned by the Identifiable Group.

Western Shoshone Legal Defense & Educ. Ass'n v. United States, 531 F.2d 495, 503 (Ct. Cl. 1976), *cert. denied*, 429 U.S. 885.

In dismissing the attempt of the dissenting, or "land," group to change the claimants' legal theory, the court noted:

> In the Commission below, however, appellants did not assert that a majority of the Identifiable Group was opposed to the Temoak Bands' position in 1951 (filing of the claim) or 1957 (hearing on title) or 1962 (determination of title

> extinction) or 1966 (stipulation as to date of valuation) or 1967 (trial on valuation) or 1972 (determination of valuation) . . . . .

Id. at 501-02.

Failing to restructure the claim before the ICC, the land group tested their theory of surviving tribal title in an independent action. The plaintiffs in the *Dann* series of decisions[1] asserted tribal rights to graze livestock on the same lands here at issue. After more than ten years, the litigation culminated with the court of appeals' decision on remand in *Dann* III, 873 F.2d 1189 (9th Cir. 1989), which established conclusively that title to Western Shoshone lands had been extinguished, that grazing rights were

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[1] The Dann line of decisions dealt exhaustively with Western Shoshone tribal title. *United States v. Dann*, 572 F.2d 222 (9th Cir. 1978) (*Dann* I); *United States v. Dann*, 706 F.2d 919 (9th Cir. 1983), *rev'd*, 470 U.S. 39 (1985) (*Dann* II); *United States v. Dann*, 873 F.2d 1189 (9th Cir. 1989) (*Dann* III).

extinguished as an appurtenance of title, and that the extinguishment included any treaty-recognized title which may have existed. *Id.* at 1200.

The internecine struggle between the land group and the money group continues to the present, and this action is another manifestation of it. Respondents supplied evidence below of Western Shoshone members who support the findings of the ICC and the payment of the award. Affidavit of Darlene C. Murphy and John B. Darrough, attached to defendants' "Opposition to Motion for Summary Judgment, Supplemental Affidavits and Documents," filed April 6, 1988. And although the ICC award remains in a trust account, federal legislation currently under consideration would result in its distribution. *See* H.R. 3897, 102d Cong., 1st Sess. (1991).

While this action was pending, the parties stipulated to an injunction which

forbad the State from enforcing the Nevada hunting and fishing laws against the Western Shoshone. Petitioners represent that the "parties cooperated amicably under the terms of the injunction," perhaps insinuating the feasibility of a shared jurisdiction over wildlife. In fact the State abided by the injunction as an order of the court, and desisted from efforts to have the injunction lifted in anticipation of a favorable decision. The obedience of the State should not be taken as acquiescence to a shared jurisdiction over wildlife. Furthermore, the State would, given the appropriate opportunity, present evidence that the Western Shoshone did not comply with the terms of the injunction.

ARGUMENT

Petitioners by their action attempt to drastically alter the established order of wildlife management and protection

in the State of Nevada. Nevada has, through its Department of Wildlife, for many years conducted an extensive program of wildlife management for the benefit of all its citizens, including the Western Shoshone. The State has invested millions of dollars in the wildlife resource, necessarily working in cooperation with the federal land management agencies which have jurisdiction over more than eighty percent of the State, and in the belief that the Indian land claims issues were resolved through the federal government's payment of an award to the Western Shoshone.

Besides irrevocably altering the current jurisdiction over wildlife, acceptance of petitioners' theory would place all manner of land interests with any federal derivation--whether water rights, mineral interests, leases, easements, or outright patents--subject to

Indian claims once the interests are identified in the hands of a non-federal transferee. Tribal claims could be made against such property interests created in the future, or, as here, against subsisting ones.

Respondents agree with petitioners that the issues raised in this case are of great moment. However, in respondents' view they are significant only because petitioners invite radical change in the law relating to finality of ICC awards and in jurisdiction over land and wildlife in Nevada. The decision of the court of appeals rejected the invitation after a fair review of the arguments on both sides. The decision does not deviate from established precedent, and establishes no new or unconventional principles of law. In order to show that it does, petitioners misstate several material factual and legal matters.

(1) THE U.S. SUPREME COURT HAS DETERMINED THAT WESTERN SHOSHONE TITLE TO LANDS IN NEVADA IS EXTINGUISHED.

Petitioners resolutely fail to acknowledge the holding of this Court in *United States v. Dann*, 470 U.S. 39, 105 S. Ct. 1058 (1985), that Western Shoshone title is extinguished. Petitioners defy this Court's ruling by repeated citation to the reversed Ninth Circuit decision at 706 F.2d 918. The Supreme Court decision dealt directly with the extinguishment issue, and was not a reversal "on other grounds," as petitioners represent. Petition at vi and 4. Yet petitioners dissemble on the issue of extinguishment, stating in one place that they are not "by this action challenging the ICC's finding of title extinguishment," Petition at 21, but then saying that:

> the court of appeals embarked on an alternative, but faulty, route of analysis [when it] ... found an actual extinguishment of Western Shoshone rights on the basis of nothing other than

> the award in the claims proceedings. Thus the Ninth Circuit went far beyond *United States v. Dann*, 470 U.S. 29, in which this Court simply held that "payment" occurred in Docket 326-k with the effect of setting in motion the statutory bar.

Petition at 24. *See also id.* at 9, n.1 ("[o]n *certiorari*, this Court reversed the Ninth Circuit decision, but only on the ground that 'payment' within the meaning of the statutory bar had occurred"). Petitioners thus persist in the erroneous view that title is not extinguished. The court of appeals acknowledged in the Dann decision on remand that this Court's decision conclusively established extinguishment, *Dann* III, 873 F.2d at 1194, a clear holding which petitioners' recondite treatment of the issue seeks to avoid.

(2) THE ICC AWARD EXTINGUISHED SHOSHONE TITLE, WHETHER IT WAS ABORIGINAL OR TREATY-RECOGNIZED TITLE.

The claim submitted to the ICC by the Western Shoshone was for loss of

aboriginal **and** treaty-based title to the land. The treaty relied upon by petitioners--the Treaty of Ruby Valley, 18 Stat. 689 (1869)--was expressly pled in the Western Shoshone claim to the ICC. *See* n.1, *infra*. It is disingenuous for petitioners to state that the ICC award was for the taking of "Western Shoshone aboriginal land title," Petition at i, when in fact the award was for the taking of tribal title, whether aboriginal or treaty-based. *See also Dann* III, 873 F.2d at 1200 ("the district court accordingly erred in holding that the Danns held **treaty** grazing rights") (emphasis added).

(3) TREATY CONSTRUCTION IS UNNECESSARY BECAUSE THE TREATY WAS PLED TO THE ICC AS A BASIS FOR THE SHOSHONE CLAIM.

The decision of the court of appeals does not interpret the Treaty of Ruby Valley. Since the Treaty of Ruby Valley was pled by the Shoshone in their claim to

the ICC, it was unnecessary for the court of appeals to interpret the treaty, as the court itself recognized. *Western Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 203 (1991). Petitioners' exposition on treaty interpretation is therefore immaterial. Even if the Treaty of Ruby Valley created rights in the Western Shoshone,[2] and

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[2] Even if the Treaty of Ruby Valley is construed, the opinion of this Court in *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945), guides that construction. The Court addressed the series of treaties of which the Treaty of Ruby Valley is one:

> Nowhere in any of the series of treaties is there a specific acknowledgment of Indian title or right of occupancy. It seems to us a reasonable inference that had either the Indians or the United States understood that the treaties recognized the Indian title to these domains, such purpose would have been clearly and definitely expressed by instruction, by treaty text or by the reports of the treaty commissioners, to their superiors or in the transmission of the treaties to the Senate for ratification.

regardless of their substance, such rights were pled in the ICC claim, and were extinguished by payment of the award for "full title extinguishment."

(4) HUNTING AND FISHING RIGHTS, BY OPERATION OF LAW, GO WITH TITLE.

Petitioners seek to reduce title to its component parts and then to preserve a residuum of title in the form of one of those rights. However, they fail ever to address the consequence of the ICC having found "full title extinguishment" and having paid for the "entire fee."[3]

Id. at 348. The court of appeals' conclusion that "there is no treaty which grants the Shoshone hunting and fishing rights," *Molini*, 951 F.2d at 203, was uttered after a careful briefing of this precedent by the parties.

[3] The ICC valuation, besides being for the "entire fee," *Temoak Band*, 219 Ct. Cl. at 357, was based on fair market value, *Western Shoshone Identifiable Group v. United States*, 29 Ind. Cl. Comm. 5, 57 (1972), and "highest and best use." *Id.* at 73-74. According to this Court, such valuation includes appurtenances such as hunting and fishing rights:

To discover the meanings of these phrases, the court of appeals referred to decisions which dealt with correlative terms. It referred to this Court's decision in *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribes*, 473 U.S. 753 (1985), which was intended to resolve a split in the Circuits on the broader principle of the incidents which go with title, *id.* at 764, and should therefore not be limited as suggested by petitioners. The Court in *Klamath* said that a general conveyance "unquestionably"

> [T]he fact that there was no separate valuation of the right to hunt and fish on the ceded lands is consistent with the view that the parties did not understand any such separate right to exist, and that the value of fish, game, and vegetation on the ceded lands was subsumed within the estimated value of the land in general.

Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 773, 105 S. Ct. 3420 (1985).

carries with it hunting and fishing rights. *Id.* at 766.

The court of appeals also referred to *In re Wilson*, 634 P.2d 363 (Cal. 1981). The decision in that case contains an encyclopedic study of transfer of tribal title, confirming that, without exception, hunting and fishing rights go with title as incidents of title.

Petitioners ultimately rely on the Treaty of Ruby Valley for preserving some aspect of title from this otherwise normal operation of law. This reliance begs the question, however, because the Treaty itself was pled in the proceeding in which the findings included full title extinguishment. Thus even if the Treaty created and reserved out separate rights, they were part of the "full title" which was extinguished. On this point, petitioners' authorities are distinguishable; none dealt with a similar extinguishment.

The decisions relied on by petitioners' also do not address payment of ICC awards. The Chippewas in *Lac Courte Oreille v. Voigt*, 700 F.2d 341 (7th Cir. 1983), made no claim to the ICC; they argued against extinguishment of expressly "guarantied (sic)" privileges of hunting, fishing and wild rice gathering by an 1850 Executive Order. The Sioux Tribe in *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809 (8th Cir. 1983), made no claim to the ICC. Instead, their 1868 treaty expressly established tribal hunting and fishing rights which survived when Congress used reservation lands for flood control purposes. There had never been an ICC award to the Ottawa and Chippewa in *United States v. Michigan*, 471 F. Supp. 259 (W.D. Mich. 1979); their right to fish, established in an 1836 treaty recognizing the right until the land was needed for settlement, was unaffected

because the lake bed was not required for settlement.

Petitioners' obscure and undisciplined assessment of the relationship between title and hunting and fishing rights therefore avoids confronting the ICC finding of "full title extinguishment," and attempts to create a legal issue where there is none.

(5) PETITIONERS SEEK TO CREATE A NEW PRECEDENT WHICH WOULD PERMIT INDIAN LAND CLAIMS AGAINST NON-FEDERAL ENTITIES AFTER PAYMENT OF AN ICC AWARD.

Petitioners urge that there is no impediment to claims against non-federal defendants, even though the ICC award established tribal title extinguishment as against the United States. However, where an ICC payment establishes title extinguishment, there is nothing left of title to litigate, whether with a private party, *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1481 (D. Ariz. 1990), *aff'd*

sub nom. Havasupai Tribe v. Robertson, 943 F.2d 32 (9th Cir. 1991), the United States, *Dann* III, or another sovereign, *United States v. Pend Oreilles Public Utility District No. 1*, 926 F.2d 1502 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 415 (1991).

The Indian Claims Commission Act was crafted precisely to bring finality to the Indian land claims. It cannot have been Congress' intention to preserve predatory claims against non-federal transferees. When compensation has been paid under the Act for "full title extinguishment," the tribal claimants should not be permitted to pursue a third party for additional compensation or recovery of the land and its incidents.

No relevant authority is cited to the contrary. Petitioners' reference to *Cayuga Indian Nation v. Cuomo*, 667 F. Supp. 938, 947 (N.D. N.Y. 1987), is

misleading. The action there concerned a claim for lands taken by direct tribal-state treaty transferring tribal lands to the state in violation of the Nonintercourse Act. In contrast, Nevada has never treated independently with the Western Shoshone; the only Western Shoshone treaty was with the federal government. *Cf. Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1472 (10th Cir. 1987) (agreeing with lower court that "a tribe may not avoid the exclusivity bar of § 70k of the Indian Claims Commission Act by seeking title, possession and damages from successors in interest of the United States, where suit against the federal government is barred").

Mutuality of parties is not always necessary, as petitioners insist. In particular, the special need for finality in real property adjudications is recognized by this Court. In *Nevada v. United*

States, 463 U.S. 110, 103 S. Ct. 2906 (1983), the Court allowed new defendants to use a prior water rights adjudication to which they were not party to estop the United States, suing on behalf of the Pyramid Lake Paiute Tribe, from seeking additional rights.

> [E]xceptions to the res judicata mutuality requirement have been found necessary . . . . [E]ven though quiet title actions are *in personam* actions, water adjudications are more in the nature of *in rem* proceedings. Nonparties such as the subsequent appropriators in these cases have relied just as much on the [prior decree] in participating in the development of western Nevada as have the parties of that case. We agree with the Court of Appeals that under "these circumstances it would be manifestly unjust . . . not to permit subsequent appropriators" to hold the Reservation to the claims it made in [the prior litigation] . . . .

Id., 463 U.S. at 143-44 (citations omitted). *See also Mashpee Tribe v. Watt*, 707 F.2d 23, 24 (1st Cir. 1983), *cert. denied*, 464 U.S. 1020, 104 S. Ct. 555

("[t]he addition of other defendants and parcels of land does not change the [res judicata] result, for title to all [tribal] land is what was, and what remains, at stake").

(6) PETITIONERS SEEK TO REPUDIATE THE ICC AWARD BY INVITING AN EVIDENTIARY BATTLE MORE THAN FORTY YEARS AFTER THE WESTERN SHOSHONE PRESENTED THEIR CLAIM.

Petitioners' aim has all along appeared to be to repudiate the claim made by the Western Shoshone before the ICC in 1951. No doubt petitioners would welcome an opportunity to reopen this matter through evidentiary hearing and to present archival materials in an attempt to show the unfairness of the award.

Ambiguities created in the record by the passage of time in this matter could easily be exploited; much of the evidence is older than the individual parties or the attorneys litigating it, much pre-dates this century, and very little of it

would be in the possession of the State of Nevada, since it was not involved in the dealings with the Western Shoshone.

Yet even the evidence proffered by the petitioners carries inconsistencies and ambiguities. Petitioners at one point maintain that only a small fraction of the Shoshones' aboriginal lands were taken from them, Petition at 18, and that they have "continued to hunt and fish . . . without regard to Nevada Wildlife laws and regulations, throughout [their aboriginal lands]." *Id.* at 5. But they also offer proof that the Shoshone were deprived of virtually all Indian hunting and fishing rights at least as early as 1931. Appellants' Opening Brief at 38, n.13.

Petitioners proffer thirty-year old correspondence from Robert W. Barker, Western Shoshone's own counsel, as proof of the Western Shoshone understanding of the effect of the claim. If it is proof

of anything, it is of counsel's misunderstanding of the operation of the claims award. Nowhere in the claims proceedings or decisions is there any corroborating reference to a surviving right to hunt or fish. Further, much evidence also exists that hunting and fishing rights were precisely the rights compensated by the award, as argued in the brief of respondents below.

Petitioners also attempt to renew questions about the Western Shoshones' representatives before the ICC and about possibilities of fraud and collusion. Petition at 23-24. If these questions were untimely raised and unsupported in 1976, *Western Shoshone Defense & Educ. Ass'n*, 531 F.2d at 499-500, they are untimely now in 1992.

Petitioners therefore invite a reweighing of evidence which already has been or could have been brought before the

courts in earlier proceedings. This Court precluded reentry into such a factual morass with its decision in *Dann*, 470 U.S. 39 (1985); there is every reason in law and equity to do the same in this instance.

(7) PETITIONERS' EQUITABLE ARGUMENTS OVERLOOK THE COMPENSATION PAID BY THE ICC.

Petitioners resort to an appeal to the Court's sympathies, citing the identification of the Western Shoshone with the land, and the injustice of separating them from the wildlife resource. Petition at 10. This argument fails to acknowledge that the ICC award of many millions of dollars has been paid. Justice has been done on the terms established by Congress.

CONCLUSION

Western Shoshone title to lands in Nevada, whether aboriginal or treaty-recognized, was extinguished by virtue of the payment on the ICC claim, as held in

the Dann decisions.

The title which was extinguished included hunting and fishing rights, by virtue of the operation of law with respect to "full title extinguishment."

Title cannot be litigated against the State, since nothing remains of title. Repose in judgment should not be disturbed, particularly in view of the award paid to the Western Shoshone and the harm that would result to the land interests in Nevada if such precedent is created.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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